

STATE OF MICHIGAN
COURT OF APPEALS

JEAN GERALD FRANCOIS,
Plaintiff-Appellee,

UNPUBLISHED
November 30, 2004

v

BUTTERBALL FARMS, INC.,
Defendant-Appellant.

No. 248356
Kent Circuit Court
LC No. 01-003021-CZ

and

LOUIS SANDERS,
Defendant.

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant Butterball Farms, Inc. appeals by leave granted the trial court's denial of its motion for summary disposition as to plaintiff's claims of assault and battery, negligent hiring, and violation of the Civil Rights Act, MCL 37.2101 *et seq.* We reverse and remand for entry of an order granting summary disposition in favor of defendant.

Plaintiff, a Haitian immigrant, was employed by defendant as a production employee for nine months. Because defendant manufactures food products, production employees are prohibited from having facial hair. When plaintiff came to work unshaven, he was separately approached by two supervisors who informed him that he would have to come off the production line and go home to shave. When plaintiff did not leave, his immediate supervisor, team leader Michelle McDaniels, informed him that he must go home to shave, but that he could return to work later that day when he was clean-shaven. Plaintiff became angry, loud, and verbally aggressive, and refused to leave. McDaniels asked processing team leader defendant Louis Sanders to assist her in calming plaintiff down and persuading him to go home to shave. Sanders did so, and plaintiff went to the locker room to retrieve his belongings. After five minutes elapsed, McDaniels asked Sanders to make sure plaintiff had left the premises. Plaintiff and Sanders have differing accounts of the events that transpired next.

According to Sanders, when he was headed to the locker room to make sure plaintiff was gone, he encountered plaintiff at the front office door. Plaintiff was making "weird accusations,"

and then “just went to kicking . . . and swinging.” When plaintiff attempted to kick Sanders in the groin area, Sanders wrapped his arms around plaintiff to prevent him from hitting or swinging again. Plaintiff “head-butted” Sanders, and the two men fell to the floor. Plaintiff’s head struck the ground, and Sanders landed on top of him.

According to plaintiff, Sanders followed him to the locker room and attacked him from behind. Sanders hit him on the back of his neck and he fell. Sanders picked plaintiff up and struck his head against a step. Plaintiff ran up the stairs, and Sanders chased after him, hitting him repeatedly.

In any event, the police were called and plaintiff was taken to the hospital, where he received treatment for injuries sustained in the altercation. According to plaintiff, “they put some clamps on his face” where he had been hit, and “gave [him] a shot and they did a lot of things.”

It was later discovered that there was a possible motive for plaintiff to attack Sanders. Plaintiff’s wallet had been stolen from the locker room a few days before the incident. At the time, the only other people in the locker room were Sanders and Kurt Tolliver, a co-worker. Following plaintiff’s attack on Sanders, Tolliver admitted that he had taken plaintiff’s wallet, and speculated that plaintiff believed Sanders had stolen the wallet, and that plaintiff’s attack on Sanders was retribution for the theft.

Following the incident, plaintiff was terminated. Carol Schipper, assistant to the operations manager, testified that after speaking with second-shift team leader coordinator Diana San Miguel, processing team leader Sanders, and the police, it was a “logical decision” to terminate plaintiff. Plaintiff testified that he was terminated over the phone.

Plaintiff brought suit against defendants Butterball Farms and Sanders, alleging: count I - “assault and battery”; count II - “intentional or negligent infliction of emotional distress”; count III - “intentional tort – assault and battery – per MCL 418.131(1)”; count IV - “intentional tort – intentional infliction of emotional distress – per MCL 418.131(1)”; count V - “Elliott-Larsen Civil Rights”; and count VI - “negligence – defendant Butterball.”

Butterball Farms moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), for the following reasons:

1. Plaintiff’s assault and battery claims against Butterball (Counts I and III) must be dismissed for the reason that they are preempted by the exclusive remedy provisions of the Workers Disability Compensation Act. These claims should also be dismissed for the further reason that Plaintiff cannot establish respondeat superior liability against Butterball.
2. Plaintiff’s claim for negligent infliction of emotional distress against Butterball (Count IV) again must be dismissed because it is preempted by the Workers Disability Compensation Act. Further, this claim must be dismissed as a matter of law because Plaintiff cannot establish any of the required elements.

3. Plaintiff's intentional infliction of emotional distress claim (Count II) must be dismissed because Plaintiff has failed to show either extreme and outrageous conduct or that he suffered severe emotional harm.

4. Plaintiff's negligence claim against Butterball (Count VI) must also be dismissed because it is preempted by the Workers Disability Compensation Act.

5. Plaintiff's Elliot[t]-Larsen Civil Rights Act claim (Count V) must be dismissed because Plaintiff cannot prove that Butterball's legitimate, non-discriminatory reason for Plaintiff's termination, i.e., an attack and assault on a supervisor, was a mere pretext for disability discrimination. Further, Plaintiff cannot prove that Butterball did, in fact, discriminate against Plaintiff based on his ethnicity or national origin.

Sanders moved for partial summary disposition on plaintiff's claim against him for intentional infliction of emotional distress and plaintiff's claim against him under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*

Following a hearing on Butterball Farms' motion for summary disposition and Sanders' motion for partial summary disposition, the trial court granted summary disposition in favor of Sanders on plaintiff's alleged violation of the CRA, and in favor of Butterball Farms and Sanders on plaintiff's claims of "intentional and/or negligent infliction of emotional distress." The trial court further ordered that:

all other claims asserted and alleged by Plaintiff in his First-Amended Complaint against Defendants remain, and, as such, Defendant Butterball Farms, Inc.'s motion for summary disposition is denied as to Plaintiff's claims against it for assault and battery, violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, and negligent hiring, supervision, retention, and/or training.

Butterball Farms appeals by leave granted the trial court's partial denial of its motion for summary disposition.

Defendant first argues that the trial court erred in denying its motion for summary disposition regarding plaintiff's assault and battery claim, because it is barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131. We agree. "Questions regarding the exclusive remedy provision of the Michigan Worker's Disability Compensation Act (WDCA) are reviewed pursuant to MCR 2.116(C)(4) to determine whether the circuit court lacks subject-matter jurisdiction because the plaintiff's claim is barred by the provision." *Bock v General Motors Corp*, 247 Mich App 705, 709-710; 637 NW2d 825 (2001); *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000).¹ We

¹ To the extent that defendant sought summary disposition pursuant to MCR 2.116(C)(8) and (10), we note that where the record permits review under the correct subpart, the trial court's ruling on a motion for summary disposition under a different subpart does not preclude appellate review according to the correct subpart. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc* (On (continued...))

review de novo the grant or denial of a motion for summary disposition based on the WDCA exclusive remedy provision. *Bock, supra* at 710. When reviewing a motion under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact. *Id.*; MCR 2.116(I)(1). Whether the facts alleged in the pleadings are sufficient to constitute an intentional tort is a question of law for the court; whether the facts alleged are in fact true is an issue for the jury. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996).

MCL 418.131(1) provides in pertinent part:

(1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Therefore, to invoke the intentional tort exception to the exclusive remedy provision of MCL 418.131(1), "an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent." *Travis, supra* at 180. Additionally, "the employer's intent to injure [may] be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge." *Id.*

Plaintiff argues that defendant knew about the alleged tortious act by Sanders but failed to stop it. See *Travis, supra* at 169-170 (the phrase "deliberate act" encompasses omissions, where an employer consciously fails to act). However, even viewing the evidence in a light most favorable to plaintiff, no evidence established that defendant acted with the specific intent to injure plaintiff, or that it had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. See *id.* at 174, 178-179. Even assuming the alleged assault occurred as plaintiff described it, there is no factual support for the argument that defendant authorized it or even knew it was going to occur. Therefore, the trial court erred in denying defendant's motion for summary disposition with respect to plaintiff's claims of assault and battery against defendant.²

(...continued)

Remand), 242 Mich App 645, 651 n 4; 620 NW2d 310 (2000); *Michigan Basic Prop Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; 618 NW2d 32 (2000).

² In light of our finding that plaintiff's claims of assault and battery against defendant are barred by the exclusive remedy provision of the WDCA, MCL 418.131(1), we need not consider defendant's alternative argument that it cannot be held liable for the intentional torts of its employee under a respondeat superior theory of liability.

Defendant next argues that the trial court erred in denying its motion for summary disposition regarding plaintiff's negligent hiring claim. We agree, and find that plaintiff's negligent hiring claim is also barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 235; 477 NW2d 146 (1991). As discussed, *supra*, "[t]he WDCA bars claims brought by employees against their employer for injuries sustained in the course of employment unless the claim is one for an intentional tort." *Id.* And "[a]n employer is deemed to have intended an injury if it had actual knowledge that an injury was certain to occur and wil[l]fully disregarded that knowledge." *Id.*

In *Downer*, *supra* at 233, the plaintiff brought a claim against her employer for negligent hiring after she was sexually harassed by one of the defendant's employees. This Court held that the trial court properly granted the defendant employer's motion for summary disposition on the negligent hiring claim because the plaintiff alleged that her employer acted *negligently* in hiring the employee, but did not allege that her employer acted intentionally. *Id.* at 235-236. This Court reasoned that because the plaintiff did not allege an intentional act on the part of the employer, the negligent hiring claim was barred by the exclusive remedy provision of the WDCA, MCL 418.131(1). Similarly, in the instant case, plaintiff alleged that defendant acted negligently in hiring Sanders, but did not allege that defendant acted intentionally. Therefore, plaintiff's negligent hiring claim is barred by the exclusive remedy provision of the Worker's Disability Compensation Act, and the trial court erred in denying defendant's motion for summary disposition on this basis.

Defendant next argues that the trial court erred in denying its MCR 2.116(C)(10) motion for summary disposition on plaintiff's national origin discrimination claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq.* We agree, and find that plaintiff failed to present sufficient evidence that discrimination was a determining factor in defendant's decision to terminate his employment.

We review de novo a trial court's determination regarding a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we considers the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners*, *supra* at 397.

Pursuant to MCL 37.2202(1)(a), an employer shall not do any of the following:

Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

To establish a prima facie case of discrimination, a plaintiff must prove that he was: (1) a member of a protected class; (2) subject to an adverse employment action; (3) qualified for the position; and (4) discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). At issue in this case is element four—whether plaintiff established that others, similarly situated and outside the protected class, were unaffected by the employer’s adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). To show that an employee was similarly situated, the plaintiff must prove that “‘all of the relevant aspects’ of his employment situation were ‘nearly identical’ to those of [another employee’s] employment situation.” *Id.* at 700.

Plaintiff maintains that he was similarly situated to Sanders, a non-Haitian employee who was not discharged following the physical altercation, in the sense that both men were involved in a physical altercation at work. However, “similarly situated” typically means of the same rank and employment history. See, e.g., *Town, supra* at 700. Thus, a more apt argument would have been for plaintiff to compare himself to another employee of the same rank and employment history that was involved in an altercation with an employee of higher rank and seniority, but who was retained. *Id.* Plaintiff has come forward with no cases where employees of different ranks involved in a common altercation were considered “similarly situated” for purposes of a discrimination claim, and “a party may not leave it to this Court to search for authority to sustain or reject its position.” *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

We find that plaintiff failed to present evidence showing that all of the relevant aspects of his position were nearly identical to those of Sanders. Although plaintiff and Sanders were both production employees, plaintiff had only been employed by defendant for nine months, whereas Sanders was a team leader who had been employed by defendant for three years. Therefore, plaintiff and Sanders were not similarly situated, and plaintiff has not created an inference of disparate treatment. Moreover, plaintiff’s primary argument appears to be that he was discriminated against because defendant chose to believe Sanders’ account of the incident instead of his account of the incident. However, there was no evidence that defendant disbelieved Sanders’ account of the incident and fired plaintiff nonetheless because he is Haitian. Because plaintiff failed to present a prima facie case of national origin discrimination, the trial court erred in denying defendant’s motion for summary disposition on this basis.

We reverse and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra